Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

VIRGINIA LAW REGISTER

R. T. W. DUKE. JR., EDITOR.
A. R. MICHIE AND FRANK MOORE. ASSOCIATE EDITORS.

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

During the session of our Supreme Court of Appeals in Staunton in September several decisions of great importance were handed down. The absence of Judge Keith during the entire session was of course to be regretted—all the more so from its melancholy cause, the wife of that distinguished jurist having died during the summer. The sympathy of Judge Keith's large circle of friends goes out to him in the loss of this gentle lady, whose beauty, alike of person and character, endeared her to all who had the privilege of her acquaintance.

The September Term of the Supreme Court of Appeals.

Four of the cases which were decided in Staunton passed upon questions of common-law pleading. In all of these it is hard to see how the result could have been other than as the Supreme Court held, but the same would have been true had a simple complaint been filed in each case. Four passed upon instructions. In one the Court sustained the salutary rule, now become well-fixed law in Virginia, that the refusal to give or the giving of certain instructions will be considered harmless if upon the facts proven there could have been no other verdict rightly given. It is to be regretted that this rule should not have been applied in the case of Norton Coal Co. *v.* Hanks, in view of the decision in Norton Coal Co. *v.* Murphy. Hanks and Murphy were employees of the Norton Coal Company. Hanks was killed and Murphy injured by a fall of slate in one of the defendant's mines, whilst they were working together. Hanks' administrator brought an action against the company, and Murphy also. Murphy recovered damages and the Court sustained the verdict, which was upon a demurrer to evidence, as

Pleadings and Instructions.

clearly right. The verdict in favor of Hanks' administrator was set aside because inconsistent instructions were given. The evidence of negligence in both cases was identically the same. Why should Murphy recover and Hanks' administrator be put to the heavy cost of a reversal, when his case as to the merits was on all fours with Murphy's? The fact that there was a demurrer to the evidence in Murphy's case, and that the case went to the jury in the other, does not seem to us to alter the result, and if there was ever a case in which the rule as to harmless error in giving an erroneous or inconsistent instruction should have applied, it was in this.

Extradition of Political Refugees.

In all of the extradition treaties which the United States has entered into with foreign countries, except the recent treaty with Portugal, it is expressly declared that their provisions shall not apply to crimes or offenses of a political character. And the British law likewise provides that political offenses shall not be extraditable. Now although several treaties provide that an attempt against the head of a foreign government or member of his family when such act comprises the act of murder, assassination, or poisoning, shall not be considered a political offense, no such provision is found in the treaty entered into between this country and Russia. And the question is now presented whether the mere fact that a person is a Revolutionist is sufficient ground for recognition by this country of extradition papers presented to us by the Russian government. A giant petition has been sent to the President urging the refusal of the demand of the Russian government for the extradition of Jan Janoff Pouren as significant of the public opinion here upon certain aspects of our treaty relations with Russia. And aside from the prayer of these petitioners, this government is called upon to examine, through a committing magistrate, with unusual care, the evidence submitted by the Russian government in its attempt to prove that the accused is a criminal, and not as asserted here, a political refugee. Against the accusation that he is an ordinary criminal stands a statement of twelve of his countrymen declaring that he is a member of a military revolutionary organization, and that they participated with him in the revolution-

ary movement. Of course, if he is merely a political refugee, the extradition should be refused in accordance with the law of nations. And in like manner, although a crime were charged against him and the charge sustained by good prima facie evidence, extradition must be refused under the treaty if the crime was committed merely as an incident of the Revolutionary attempt. Because a reasonable principle governing extradition procedure would seem to be that if the act committed in the course of a revolutionary outbreak were such as would be usual and lawful in actual war, the offense must be considered political and not criminal. Extradition would not be allowed under our treaty with that government if there were good reason to believe that the government making the demand desired to punish a political agitator under the pretense of trying him for an ordinary penal offense. While this government is on very friendly terms with Russia, it will be observed that the construction she puts upon the treaty of 1832 is one against which we have repeatedly protested. Although that treaty guaranteed mutually the right of citizens of either country to sojourn and reside in the other, enjoying the security and protection accorded to its own citizens, Russia has universally denied to our Jewish citizens the right to enter her domains, and diplomatic and consular officers refused to vise their passports. This violation of our treaty rights, as is well known, has been the subject of a great deal of correspondence between the state department and the Russian government, and their protests have passed unheeded. Inasmuch as we permit in this country no official inquiry into religious belief and no discrimination on account of such belief, we cannot with patience submit to such discriminations made by a foreign government with respect to our citizens; while the case of Pouren is not directly related to this matter, it naturally serves to bring into prominence the unsatisfactory character of our present treaty relations with the Czar's government, and certainly would not call for any very liberal construction of that clause of the treaty denying extradition for political offenses. Unless through friendly remonstrance a modification of the present Russian practice can be secured, there will be increasing pressure for a revision of the treaty. [Since this editorial was written the secretary of state has refused to issue a warrant for the surrender of the accused.]

In Moorman *v.* Arthur, 90 Va. 485, our Court of Appeals adopted in full the reasoning and conclusion of the learned circuit judge and made his opinion the judgment of that court. That was a case of great importance and settled many interesting legal propositions. Fortunately an appeal was taken in this case, and the profession thus enabled to get the benefit of this valuable precedent, but that many cases of equal or even greater importance are decided daily on the circuits of which we get no report, except occasionally such cases as are sent to the LAW REGISTER, cannot be doubted, yet will anyone argue that they are of no value merely because not reviewed by the highest state court to which the case can go? In Pennsylvania the trial judges write carefully prepared opinions, and these in many cases are adopted by the Supreme Court on appeals. It is a most excellent practice. It encourages the trial judges in careful work, and relieves the appellate judges of very considerable labor. The trial judges are of course anxious to do well and to deserve the approval of their judicial superiors. The practice strengthens the administration of justice where it most needs strengthening, namely, at its very fountain head, which is the trial court. Some of the very best opinions in the Pennsylvania State Reports are written by the trial judges and adopted by the Supreme Court, these becoming in fact the opinion of the latter tribunal and an exposition of the law of the case. It is believed that it would be a substantial improvement in the administration of justice in other states, whose appellate courts are overworked and unable to clear their dockets, if the trial judges should be empowered by statute to write opinions which should form part of the record on appeal, and which the appellate courts should be at liberty to adopt if approved by them. When Lord Coleridge was in this country in 1883, in his speech at the reception given him by the Bar Association of the city of New York, he mentioned the name of Judge Duer in language which leads to the conclusion that he regarded that judge as one of the distinguished judges of America. The circumstance arrested some attention and some were disposed to think that Lord Coleridge, being a foreigner and presumably not very well acquainted with our judges, had made an accidental slip, or else

Value of Opinions of Nisi Prius Courts.

some admirer of Judge Duer had coached him in respect of the qualifications of that judge. This seemed the more probable, as Judge Duer was not a judge of a court of appeal, but was one of the judges of the Superior Court of New York City. It nevertheless remains that his decisions are entitled to a very high rank, and no one who has studied them can avoid the regret that he had not been able to pronounce them in a higher court.

The Courts at the Bar of Public Opinion.

Never in the history of this country have the courts been subject to as violent attack as in the last few years. We do not think that ever before questions of judicial procedure have been made a part of a public platform. Whether justly or not, the whole procedure of our court system is, so to speak, under fire. We copy herewith two editorials from journals somewhat widely separated. The first is from the *Churchman*, a prominent organ of the Protestant Episcopal Church, published in the City of New York, which is as follows:

> "The administration of our criminal laws is being seriously questioned East and West. And the conviction is growing, as C. P. Connolly, once Prosecuting Attorney in Montana, says in Collier's Weekly, that 'something must be done to rid the law of those ancient quibbles that have done more to encourage crime than all the crime schools of the big cities.' Mr. Taft, some months ago, vigorously called attention to the need of reform in judicial procedure, and it is gratifying to see that in many parts of the country clergymen of many churches are taking leadership in crystallizing the moral sense of the community in this matter. The judges are not so much at fault as the system. They feel bound by technicality and tradition. An individual judge might have courage to break such bonds, but hardly a bench. From these 'loopholes of the law' the enemies of good government and good order draw comfortable assurance for new crimes. And there are civil cases where the offence to the public conscience is no less flagrant. Respect for law, in the widest sense of that term, lies at the foundation of all civilization. Reform of judicial procedure is the direct concern of every citizen."

The second, from the *Chicago News,* is as follows:

> "The predominant idea of the builders of the American republic was to devise a government that could not oppress the people. They succeeded. However, they have a government so hemmed in with restrictions and tied down with checks and balances and constitutional safe guards, that in many instances it is not able to afford the people protection from individual and corporate activities directed against them. The difficulty of convicting persons guilty of crime is notorious. Under the spell of tradition, our judges have resolved every doubt, technical as well as equitable, in favor of the accused. Lynch law is the popular manifestation of the contempt for the weakness which government too often manifests in failing to check wrong by lawless persons. We have seen great corporations develop, possessing tremendous powers for evil as well as good, and we have seen our governments—national, State, and local—incapable of coping effectively with these private agencies. Indeed, in many instances we find these private agencies actually directing the government and paralyzing its supposed function of protecting public rights. Is it any wonder that our people no longer fear government, but, instead, are rather disposed to regard it with a feeling approaching good-humored contempt? Is it any wonder that the necessity of checking the aggressions of powerful private interests antagonistic to the popular welfare looms up before Americans to-day as did the need of checking the tyranny of government in the days when our national institutions were taking shape?"

Are such criticisms conducive either to public good or justified by the facts? There is of course much in our criminal procedure archaic in its nature. We have given the accused in a criminal case every possible advantage, whilst we have held on to many of the rulings made by the courts when the prisoner was neither allowed counsel, permitted to call witnesses, or allowed to testify. In our zeal that no injustice should be done the accused we have not sufficiently guarded the Commonwealth, and that there is much to criticise in this respect, we have little doubt. Neither the bar, nor popular opinion have as yet been sufficiently educated away from our early criminal procedure, and until the legislators and the courts learn that we have safeguarded the prisoner in every possible way and yet left great breaches in the walls that surround the state, this criticism will continue and be justified. The method of electing judges in various of the States in our judg-

ment is also responsible for much of the trouble. We do not believe that any judge should owe his election to a popular vote. Judges are but mortals, dependent many of them upon their salaries for a living. The prospect of having bread and butter taken out of one's mouth does not conduce to an exact holding of the scales of juctice when the popular will seems surging in one direction. What we need in this country more than anything else is a reforming and reshaping of our criminal procedure and some method of selecting our judiciary by which they shall be independent and never responsive to popular clamor. Until this is done such criticism will continue to be made, and being made, will arouse public sentiment to such an extent that the respect of the people towards the courts will be weakened, and being so weakened the courts themselves will lose their strength, their dignity and their power.

English History and the Study of Law.

Lord Bacon, in his celebrated essay on Studies, tells us the manner in which different studies are supposed to affect the mind. He says: "Histories make men wise; Poetry, witty; Mathematics, subtile; Natural philosophy, deep; Moral, grave; Logic and Rhetoric, able to contend."

The legal practitioner has use for all the learning that a varied course of study can supply, and care for all the mental discipline that the application to such a course can give.

The study of history has a peculiar value to the student of law; and the value is two-fold, viz: 1. The discipline which it gives the mind, and, 2. The knowledge acquired. The student of history must necessarily apply the rules of evidence to doubtful traditions, which he finds recorded as historical truth, and he must be on the watch for anachronisms, fabrications and impossibilities. He needs to compare the accounts of contemporaneous writers, and writers not contemporaneous, and viewing all in the light of the past and present, he should be able to determine for himself, what is the truth.

This exercise is not unlike the study and comparison of conflicting decisions, and the construction of ambiguous and uncertain

language found in our statutes. It is also much like the analysis of the facts in a law case.

The facts and "wisdom," acquired by the study of history, are of almost everyday use; particularly those found in the periods when the different parts of our jurisprudence had their origin, and the times which have witnessed their growth and changes. Law may itself be considered a history, not a chronological account of a people with all their minor doings, but a record of the progress, and moral and intellectual development of a nation. Every great decision marks an epoch, and the statute books disclose the "rules of action," and the "wants and fears" of the people.

History reveals the events, the causes, the circumstances which give rise to the enactment, the repeal, the amendment of our various laws, and it will often assist in determining what is the spirit and policy of a given statute. This being true, how essential it is, that the student of our laws should make a critical study of the two great English speaking nations.

Tracing the history of England from the landing of William the Conqueror, the battle of Hastings (A. D. 1066), and the accession of the victorious Norman, we mark the growth of the law of Real Property. The military organization of Feudalism; the investiture of the man with a fief to descend, "to him and his heirs forever;" the Tenures and Estates; the Law of Landlord and Tenant; Descent and Distribution; Wills; Dower; Curtesy; Taxation; Exemption; the Statute of Frauds; and we find all the varying circumstances and conditions, which led to the growth and perfection of the law which relates to the "permanent substantial soil of the earth."

The Great Charter claims the attention of the student who would familiarize himself with the principles of constitutional law, and we learn how it was discussed and agreed to in a single day as King John bowed to necessity, "near a marshy meadow, the meadow of Runneymede." And we learn how the "Law of the Land" and "Due Process of Law," changed from the will of the prince, and the arbitrary dictates of a judge to their present legal meaning. (See Cooley Const. Lim., pp. 355-361). We find how, when, and why, the writ of Habeas Corpus was enacted; the anxiety of James II for its repeal; why William III suspended it, and how its suspension affected the people.

Parliamentary usages and practices, with their technicalities and seeming paradoxes, develop before our eyes as we pore over the historic pages.

The Triple Alliance; the Treaties of England with France and other nations; the relations of England to the United States; the arbitrament of the sword; the amicable adjustment of national disputes; the solemn promises honestly performed, and the pledged faith ruthlessly broken, teach us how the rules of International Law came to be clearly defined and laid down.

Corporations spring into life. The Bank of England is chartered (A. D. 1694). The colleges receive their franchises, almost lose them, struggle, and survive.

Crimes are defined and their punishments prescribed. Punishments change, becoming more severe in some crimes, and less in others. The Bloody Circuit (A. D. 1685) opens the eyes of the people to the necessity of a fair and impartial trial, and the dangers of a corrupt judiciary.

And so, scattered through this fascinating story of a great people, are the events and circumstances, and wants, and fears, and occasions, from which sprang and grew Equity; the Law of Contracts, embracing Partnerships, Agency, Negotiable Instruments, etc., etc.; Marriage, Divorce, Master and Servant, Torts, Negligence, Municipal Law, Bailments, Pleadings and Practice, and each and every branch of our complex though beautiful system of laws.

The necessity of the study of the History of the United States is too apparent to admit of comment, for no common school education is complete without a fair knowledge of it.

"Histories make men wise." They do if men learn their lessons, and the history of our own, and our mother country, is full of lessons. It abounds with food for serious thought, and places microscopes before the law-student's eyes. If the student become a legislator as well as a practitioner, how invaluable to him will be the lessons he has learned. He has learned among other things: That one of the safe guards of a Government is the eternal divorce of church and state: That legislation can safely proceed no faster than the popular intelligence and sentiment demand: That the perpetuity of free government rests more in the patriotism than in the power of a people: That laws should be

enacted for the whole people, and that legislation for the benefit of any class alone, is not only unwise and unjust, but dangerous: That all departments of government should be kept pure, to the end that not only we may enjoy its blessings, but that posterity may receive it untainted and unpolluted from our hands.

So it seems, that by the study of our history the law student may become a better lawyer, and a wiser legislator, and consequently a firmer believer in our government, and a braver defender of its laws.

Unanimity in Verdicts.

The jury system as now constituted is unduly subjected to the fever for change, which is prevalent in these days, and is not always considerate of the change sought. And one of our esteemed contemporaries suggests that the proper remedy is to do away with the rule requiring unanimity in the verdict. To change the jury system to less than unanimity in their verdicts, whether by three-fourths, two-thirds, or a majority, would probably end in doing away with juries altogether. Less than enforced unanimity tends to hasty and ill-considered decisions, comparatively, and the court would in new trials, etc., be compelled to make matters less satisfactory than now, and a great deal slower in reaching justice and an end of litigation. And the result would be, that finding the judge's judgment virtually substituted for that of the jury, this popular and healthy element of our courts would be got rid of. And unrelieved from mistaken, or supposedly mistaken, tendencies by the correction of popular thinking, which juries help to give, judges would find, in our free Republic, censure for assumed and imagined errors, possibly more unreasonable than now attach to the decisions of juries except in extreme cases. And when the principle of unanimity in deciding by juries should be got rid of, and the meddlesomeness of ignorant legislation had begun to remodel the system, there could not be security of permanence or end of change, except in doing away with the system altogether.

By the theory of our present legal system, juries are made judges of the facts in the case to be determined. Unlike lawyers and judges they are not especially educated for this duty, except

as they learn in the field, the shop, and the common school, and possess natural common sense. The twelve men, called to decide the facts of a case tried, may be men of different culture, faiths, origin and intellect, as much so generally, when properly selected, as twelve men can be. Yet with this diversity they are necessitated to come to one conclusion, and it may well be said that this diversity helps to a just conclusion. That conclusion, with a part and sometimes all of them, must very often be a modification of first impressions and thinkings. In comparison of views the man of feeling yields something to the man of logic: who in turn is corrected by the kind views of the other; the man who sees everything sunny is checked and modified by the sterner views of him to whom life and action is a stern and possibly sad reality. The attrition and collusion of varying minds grinds out truth to a result which could but seldom be ground out but by this system of enforced unanimity, which aims that in the conclusion reached there shall be as little excess as possible from the mean of truth and justice. Where men, under oath, agree, though ordinarily the assent of all is not wholly acquiescent, the nearest approximation to right action attainable by human means is ordinarily reached, as such assent will rarely be accorded to the verdict, where the difference of judgment on the body of the facts are material in the result reached. Less than unanimity in the conclusion reached would be liable to procure the verdict from the assent of the least considerate and capable members of the jury, and be contrary to the conclusions of the men of the strongest and clearest judgment on the panel, as truth is not necessarily with majorities. There is no right in majorities as such merely. They may be right and they may not. The determination by majorities is only a rule of convenience, ordinarily for temporary purposes and determinations, as in political matters. Besides all change is not improvement. And it fails to occur to attorneys and others, who find fault with juries and their present constitution, that in both civil and criminal cases, when juries fail to appreciate legal eloquence at the orator's value of his own effort, that in doing so, oftener than otherwise they render a larger service to good sense, better sustain the credit of courts, and reach a nearer approximation to strict justice than an opposite course would have accomplished. It is

worthy of recollection that though the action of our courts are excellent and admirable, in the application of law and fact absolute results are not attainable. It may be remarked that juries are sometimes censured for the defective action of judges and attorneys in the determinations made, and furnish a safety valve to public censure for what is carelessly and inefficiently done. Where the judge not only formally but carefully, rightfully and clearly charges the jury, and has with proper foresight, integrity and energy conducted the trial before him, whether civil or criminal, material errors in the verdicts of juries are of less frequent occurrence than is commonly believed. Besides where in civil cases the jury manifestly err, the judge when appealed to, has the power and duty to set aside the verdict, so improperly rendered, and where in important cases, this is not done, the fault is with the counsel or the court. And on what basis of better consideration of cases, of larger discussion of facts or wiser judgment of them, nine out of the twelve would give, than where unanimity of all is required is hard to understand. It might occasionally prevent the disagreement of a jury in a doubtful and difficult case, but this result of disagreement is not so frequent or so grave an evil as to require a virtual change of the system and peril of its permanence.

We believe that the suggested change would prove hurtful to the administration of justice, and once entered upon, would alternately excldde this popular element from its long-time part in the administration of justice, to the detriment of courts and the justice they administer. Juries, taken from among the people, in one form or other, are and ever have been a necessary element of judicial action in free and popular government. That the jury system is at times abused and verdicts rendered that are without truth or justice, is true. But what is needed to remedy this, so far as may be done, is in part a more careful selection of jurors, less excusing of fit and proper men from the discharge of this duty, from considerations private and personal. In unfit selection the institution of juries is degraded, and from this cause much of the desire of change is caused and occasioned. This is, however, an evil more common in cities than in the country, and in any use of juries will demand correction. It is not in changing the essential element in jury de-

terminations, but in a demand for a more careful selection of juries, that any existing prejudice against the workings of the jury system can be best eliminated. An earnest appeal a few months ago in our columns by a member of the bar that the legislature would restore some of those exempted classes has been answered by adding two additional classes, namely, dentists and licensed undertakers, and it is expressly specified that the statute shall apply to both civil and criminal cases. The exemptions are so numerous now that they may be summed up briefly as follows: No responsible citizen with human intelligence can any longer be compelled to serve on a jury; the panel is to be composed of loafers and tramps. Unquestionably these statutes exempting all the best men in the community from serving on the petit jury has gone far to bring the system to its present state of low esteem with the thinking members of the profession.